

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 02-08**

WARNING

Letter rulings are binding on the Department only with respect to the individual taxpayer being addressed in the ruling. This presentation of the ruling in a redacted form is informational only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Department policy.

SUBJECT

Application of Tennessee sales and use tax to services performed in Tennessee on [EQUIPMENT ITEMS] owned by wholesale [BUSINESSES]. Application of Tennessee sales tax to sales of used [EQUIPMENT ITEMS].

SCOPE

This letter ruling is an interpretation and application of the tax law as it relates to a specific set of existing facts furnished to the department by the taxpayer. The rulings herein are binding upon the Department and are applicable only to the individual taxpayer being addressed.

This letter ruling may be revoked or modified by the Commissioner at any time.

Such revocation or modification shall be effective retroactively unless the following conditions are met, in which case the revocation shall be prospective only:

- (A) The taxpayer must not have misstated or omitted material facts involved in the transaction;
- (B) Facts that develop later must not be materially different from the facts upon which the ruling was based;
- (C) The applicable law must not have been changed or amended;
- (D) The ruling must have been issued originally with respect to a prospective or proposed transaction; and
- (E) The taxpayer directly involved must have acted in good faith in relying upon the ruling; and a retroactive revocation of the ruling must inure to the taxpayer's detriment.

FACTS

[THE TAXPAYER] is engaged in the business of cleaning, [RESTORING], and [COATING] [EQUIPMENT ITEMS] as well as repairing of damaged [EQUIPMENT ITEMS] for wholesale [BUSINESSES]. All of the taxpayer's customers are commercial [BUSINESSES]. The taxpayer is located in [CITY, TENNESSEE]. The details of the taxpayer's operation are described as follows:

The primary service the taxpayer provides is cleaning and [COATING] [EQUIPMENT ITEMS]. Using its own truck, the taxpayer picks up [EQUIPMENT ITEMS] from various wholesale [BUSINESSES] throughout the eastern United States and transports them to its facility in Tennessee. The taxpayer cleans the [EQUIPMENT ITEMS] of all [CONTAMINANTS] and strips them of the [COATING SUBSTANCE]. The taxpayer then puts a fresh coat of [COATING SUBSTANCE] on the [EQUIPMENT ITEMS], cures them in [AN APPLIANCE], and transports them back to the customer.

The second service the taxpayer provides is [RESTORING] the [EQUIPMENT ITEMS]. Normally, the [RESTORING] service is provided at the same time as the cleaning and [COATING]. However, on occasion, the taxpayer provides [RESTORATION] only. The taxpayer picks up the [EQUIPMENT ITEMS] using its trucks, transports them to its facility, [RESTORES] the [EQUIPMENT ITEMS] using a hydraulic press, and transports them back to the customer.

The third service the taxpayer provides is the repair of damaged [EQUIPMENT ITEMS]. The taxpayer picks up the damaged [EQUIPMENT ITEMS] using its truck and transports them to its facility. The taxpayer first cleans the [EQUIPMENT ITEMS] to rid them of residue and old [COATING SUBSTANCE]. Once the [EQUIPMENT ITEMS] have a clean surface, the taxpayer [RESTORES] the [EQUIPMENT ITEMS] and straps, replaces broken [PARTS], welds [PARTS] and [EQUIPMENT ITEMS] to straps, reinforces welds on cross-braces in [EQUIPMENT ITEMS], and then grinds and buffs all welds. The [EQUIPMENT ITEMS] are re-cleaned and a fresh coat of [COATING SUBSTANCE] is applied. The [EQUIPMENT ITEMS] are then transported back to the customer. All materials used to repair the [EQUIPMENT ITEMS], with the exception of the welding supplies, are taken from the set of damaged [EQUIPMENT ITEMS] provided by the customer.

Occasionally, the taxpayer purchases used [TYPE OF] equipment and resells it to a customer. When this occurs, the taxpayer usually does not take physical possession of the equipment, but arranges to have it shipped directly to the purchaser.

QUESTIONS

1. Since all of the taxpayer's services are performed in Tennessee, should Tennessee sales tax be charged for all of the taxpayer's services, regardless of whether the customer is located in Tennessee or outside Tennessee?
2. Should Tennessee sales tax be charged for the service of cleaning and [COATING] [EQUIPMENT ITEMS]?
3. If so, should Tennessee sales tax be charged for all associated charges such as labor, materials, (e.g. [COATING SUBSTANCE]), etc.?
4. Should Tennessee sales tax be charged for the service of [RESTORING] [EQUIPMENT ITEMS]?
5. Should Tennessee sales tax be charged for the service of repairing damaged [EQUIPMENT ITEMS]?
6. If the customer has a Tennessee industrial machinery authorization, is it exempt from paying Tennessee sales tax for any and/or all of the taxpayer's services?
7. Are out of state [BUSINESSES] permitted to obtain the Tennessee industrial machinery exemption and therefore exempt from Tennessee sales tax?
8. Are [EQUIPMENT ITEMS] industrial machinery under Tennessee sales tax laws?
9. For customers who do not currently have the industrial machinery exemption but will be applying for it, will the State of Tennessee grant the exemption on a retroactive basis? If so, is the authorization automatically retroactive, or does the applicant have to specifically request a retroactive authorization to a date certain?
10. If the [EQUIPMENT ITEMS] to be serviced are shipped to and from the taxpayer's plant using a common carrier paid by the customer, is the taxpayer required to charge Tennessee sales tax for its services?
11. If the customer is located out of state and the repaired items are shipped to the out of state customer, is the taxpayer required to collect Tennessee sales tax for labor only, or is the taxpayer required to collect sales tax on charges for materials?

12. Are sales of [EQUIPMENT ITEMS] to Tennessee commercial [BUSINESSES] exempt if they have an industrial machinery exemption?
13. Are the sales of [EQUIPMENT ITEMS] to customers outside the State of Tennessee subject to Tennessee sales tax?

RULINGS

1. Yes. Absent an exemption, Tennessee sales tax is due on the services performed in Tennessee regardless of the location of the customer in or outside of Tennessee.
2. Yes. [RE-COATING] the [EQUIPMENT ITEMS] is a repair service that is taxable, absent an exemption. Cleaning of tangible personal property also is a taxable service, again assuming no applicable exemption.
3. Absent an exemption, yes. The tax is due on the gross charge for the services, which would include charges for labor and materials, and on any other charge.
4. Absent an exemption, yes.
5. Absent an exemption, yes.
6. With the exception of cleaning when performed not in conjunction with any repair services, yes. Cleaning by itself is not subject to the industrial machinery exemption, and tax should be charged.
7. Yes.
8. Yes, assuming the customer's principal business is fabricating or processing a product for sale and the customer presents a Tennessee industrial machinery authorization.
9. Retroactive industrial machinery authorizations are only granted in special circumstances as set forth in TENN. COMP. R. & REGS. 1320-5-1-1.06. A retroactive authorization, retroactive to a date certain, must be requested by the applicant.
10. Absent an exemption, yes. The method of delivery is not material in determining taxability.

11. The tax is due on the gross charge for the services, which would include charges for labor, materials, or anything else.
12. Yes.
13. Unless the sale takes place in Tennessee, no Tennessee sales tax is due. If the sale takes place in Tennessee, tax is due, absent an exemption.

ANALYSIS

(1-5) T.C.A. § 67-6-102(24)(F)(iv) provides that “retail sale,” “sale at retail” and “retail sales price” includes “[t]he performing for a consideration of any repair services with respect to any kind of tangible personal property.” T.C.A. § 67-6-102(29) defines “tangible personal property” as “personal property which can be seen, weighed, measured, felt or touched, or is in any other manner perceptible to the senses.” TENN. COMP. R. & REGS. 1320-5-1-.54(2) provides a definition of “repair services” and “repairs”, which reads in pertinent part:

For the purposes of this rule, "repair services" and "repairs" of tangible personal property shall mean and include any one or all of the following for a user and consumer; work done to preserve or restore to or near the original condition made necessary by wear, normal use, wastage, injury, decay, partial destruction, or dilapidation; mending, correction, or adjustment made for any defect or defective portion; alterations; refinishing; any cleaning that is a necessary part of any repair work; "service calls" where any repair work is done or contemplated; and changes in the size, shape, or content.

The [EQUIPMENT ITEMS] are tangible personal property and their repair, which includes cleaning¹, [COATING], and [RESTORING], is subject to sales tax. All of the charges to the customer for the repair of the [EQUIPMENT ITEMS], including the costs for labor and materials, are taxable pursuant to T.C.A. § 67-[6]-205, which levies a sales tax on “the gross charge for all services taxable under [the Retailers’ Sales Tax Act]”. The list of services that are subject to tax includes “the performing for a consideration of any repair services with respect to any kind of tangible personal property.” Absent a specific exemption, taxable services performed in Tennessee are subject to Tennessee sales tax, even if the property

¹ As described in the ruling request, the cleaning appears to be a part of the repair service, that is, the [EQUIPMENT ITEMS] are cleaned before new [COATING] is applied. It should be noted that cleaning of tangible personal property, standing alone, is also a taxable service. T.C.A. § 67-6-102(24)(F)(v), TENN. COMP. R. & REGS. 1320-5-1-.53. However, cleaning of industrial machinery, unlike repair, is not included in the definition of industrial machinery, T.C.A. § 67-6-102(13), and therefore, should the taxpayer clean the [EQUIPMENT ITEMS] other than as a part of repairs, such cleaning is not subject to the industrial machinery exemption and therefore taxable.

upon which the service is performed is exported upon completion of the service. *LeTourneau Sales & Service, Inc. v. Olsen*, 691 S.W.2d 531 (Tenn. 1985).

(6-8) T.C.A. § 67-6-206(a) exempts industrial machinery from the sales and use tax. T.C.A. § 67-6-102(13) defines industrial machinery as

[m]achinery, apparatus, and equipment with all associated parts, appurtenances, and accessories, including repair or taxable installation labor therefore, which is necessary to and primarily for the fabrication or processing of tangible personal property for resale, and consumption off the premises ... by one who engages in such fabrication or processing as his principal business.

The [EQUIPMENT ITEMS] at issue here appear to be necessary to and primarily for the production of a product for sale by the commercial [BUSINESSES]. Therefore, those customers who present a Tennessee industrial machinery authorization are not required to pay sales and use tax on the taxpayer's services.

TENN. COMP. R. & REGS. 1320-5-1-1.06(2) provides:

Persons who have obtained authority from the commissioner to make purchases of industrial machinery shall provide their vendors with a copy of their authority and such purchases shall then be exempt from tax.

There is no requirement in the law or the rule for a vendor to determine whether a particular item of tangible personal property qualifies for the industrial machinery exemption. If a purchaser presents a certificate of industrial machinery exemption that is issued by the Tennessee Department of Revenue, the vendor may accept this certificate as authority to sell the item, or perform repair services to the item, free from tax. If the Department determines that a piece of equipment does not qualify as industrial machinery, the assessment of tax is made against the manufacturer who issued the certificate and not against the person who sold or repaired the equipment.²

(9) TENN. COMP. R. & REGS. 1320-5-1-1.06(3) provides as follows regarding the effective date of the certificate and when a retroactive authorization will be granted:

Authority must be obtained prior to the purchase in order for the machinery to qualify as industrial machinery for tax purposes. However, if authority is not obtained prior to the purchase the commissioner may allow

² However, as explained in the previous footnote, the cleaning of industrial machinery (when not a part of repair) is taxable and not subject to the industrial machinery exemption. Therefore, the taxpayer, when performing cleaning services, should be aware that an industrial machinery authorization does not authorize the holder to purchase cleaning services free of tax.

retroactive application of the authority upon a showing sufficient to the commissioner that the failure to obtain authority resulted from:

1. A major restructuring of the business or the business having gone through a change in ownership; or
2. A death of a key person in the tax area of the organization; or
3. The entity having being misled by state officials which indicated that authority to purchase industrial machinery was not required; or
4. The entity having previously received authority to purchase industrial machinery but failed to renew their exemption certificate; or
5. Any other grounds that the Commissioner finds satisfactory to allow retroactive application of this exemption.

Therefore, generally, the industrial machinery authorization effective date is the date it is issued by the Department of Revenue. A retroactive authorization may be granted in special circumstances, as provided for in the rule quoted above. The applicant should set forth its special circumstances supporting its request for retroactivity in its application for an authorization, and request retroactivity to a date certain.³

(10) As discussed previously, the taxpayer is performing a taxable service, pursuant to T.C.A. § 67-6-102(24)(F)(iv). The means of shipment by which the taxpayer receives the tangible personal property that it repairs is irrelevant in determining the taxability of the service. The taxpayer may pick up the [EQUIPMENT ITEMS] using its own trucks or it may receive the [EQUIPMENT ITEMS] through a common carrier, with the carrier paid either by the taxpayer or by its customer. The taxpayer must still charge tax on its service of repairing the [EQUIPMENT ITEMS] unless otherwise exempted. The means by which the serviced property is returned to the customer is similarly not relevant in determining taxability. The fact that controls is that the services are performed in Tennessee. See *LeTourneau*, 691 S.W. 2d at 533.

(11) As previously mentioned, T.C.A. § 67-6-205 levies a sales tax on the gross charge for all taxable services, which applies to all charges. The location of the customer outside of Tennessee does not alter this result.

(12) Several of the previous questions have dealt with repairs performed for customers who hold industrial machinery authorizations, ruling that repairs performed on industrial machinery are exempt from the tax. The sale of the

³ In any event, a retroactive effective date will not be earlier than the latest date which taxes could be refunded under the appropriate statute of limitations. See T.C.A. § 67-1-1802.

machinery is exempt for the same reasons, assuming that the customer presents its authorization to the taxpayer.

(13) Tenn. Code Ann. § 67-6-102(25)(A) provides that “‘Sale’ means any transfer of title or possession, or both . . . in any manner or by any means whatsoever of tangible personal property for a consideration[.]” A sale which occurs outside the state is not subject to Tennessee sales tax, and will not be subject to Tennessee use tax unless the property is returned to Tennessee at a later time. *Eusco, Inc. v. Huddleston*, 835 S.W. 2d 576, 582 (Tenn. 1992); see also, Tenn. Code Ann. § 67-6-313. Thus, whether the sales of the equipment are subject to sales tax in Tennessee turns on where the sale occurs.

The elements of a sale are “(1) transfer of title or possession, or both of (2) tangible personal property, for a (3) consideration.” *Volunteer Val-Pak v. Celauro*, 767 S.W. 2d 635, 636 (Tenn. 1989); see also, Tenn. Code Ann. § 67-6-102(25)(A). The place in which title or possession of the products passes is the location of the sale. If one or the other passes in Tennessee, the sale is subject to tax even if the buyer immediately exports the item. See *Jack Daniel Distillery v. Jackson*, 740 S.W.2d 413 (1987).

In those cases where the equipment is shipped from its out of state location to the customer’s out of state locations, it is clear that neither title nor possession passes in Tennessee, and such sales are not subject to the Tennessee sales tax.

In those cases where the equipment is located in Tennessee prior to being sold, it is necessary to resort to an analysis of where title and/or possession passes to determine if the taxpayer should collect the tax. If the customer receives possession of the goods in Tennessee, the transaction is subject to Tennessee sales tax. If the contract of sale specifies that title to the goods passes in Tennessee to the out-of-state customer, Tennessee sales tax applies. Otherwise, the Department of Revenue’s position is that if the buyer has hired the carrier to pick up the goods in Tennessee, Tennessee tax should be collected. The seller should not collect Tennessee sales tax if the seller hires the carrier to transport the goods to the buyer outside Tennessee.

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APPROVED: Ruth E. Johnson
Commissioner

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